



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

B5

File: WAC 98 197 51176 Office: California Service Center Date:

AUG 24 2000

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

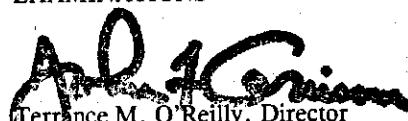
If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy


Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

It is noted that the Form I-140 petition identifies [REDACTED] of Arcadia, California, as the petitioner. The petition, however, was signed not by any [REDACTED] representative, but by the alien himself. Therefore, the alien and not [REDACTED] shall be considered to be the petitioner.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as chief architect for [REDACTED]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute the petitioner's eligibility for classification as a member of the professions holding an advanced degree. The sole issue on appeal is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the

committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The application for a national interest waiver cannot be approved. The regulation at 8 C.F.R. 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The record does not contain this document, and therefore, by regulation, the petitioner cannot be considered for a waiver of the job offer requirement. Because the director did not clearly note this omission in the decision, discussion of the merits of the national interest claim appears below.

In a letter dated June 29, 1998 accompanying the petition, counsel explains the nature of the petitioner's work, and its significance:

Currently holding a[n] H1B1 visa valid through December 1, 2000. [the petitioner] is now the Chief Architect of [redacted] a project which has provided solution[s] to the Y2K problem. . . .

[W]ith the approaching of January 1, 2000, medium and large computer systems used in many places would fail due to dating logic problems. In specific, it is the format problem of two-number [dates]. The number "00" which now represents the year 2000 would not be distinguished by computers from being read as the year 1900. . . . According to experts, such error would cause chaos in many computer systems, paralyzing international trade, national defense, transportation, banking -- everything that is run by a computer network would be affected. If this problem is not solved within two years, disturbance will pervade the world.

When considering the above arguments, two points cannot escape the Service's notice. As of this writing, January 1, 2000 has come and gone, with only minor and isolated computer problems, and no large-scale disruption; the apocalyptic scenario envisioned by many did not come to pass. Counsel's letter focuses heavily on the need to resolve the problem before 2000, and asserts that the petitioner has played "a significant role in the research of Y2K solutions." For obvious reasons, such concerns now lack the urgency with which counsel vested them in 1998. If the chief purpose for granting a national interest waiver were to save government and business computer systems "from a possible enormous loss," that purpose is now largely moot. Even if the petitioner were to show that he deserved much of the credit for averting a Y2K catastrophe, the national interest waiver is intended to provide prospective benefit to the United States rather than to reward past work. Counsel has not explained how the U.S. can expect to reap continued benefits from the petitioner's work after the 1999/2000 changeover.

Also, as counsel stated, the petitioner is already working for [redacted] under an H-1B visa which is valid through December 1, 2000. Therefore, no further immigration benefits would have been necessary for [redacted] to employ the petitioner through, and eleven months past, the crucial date of January 1, 2000. Counsel's dire predictions regarding Y2K-related chaos do not explain how the petitioner's work during late 1998 and 1999 would in any way be affected if the petitioner was an immigrant, rather than a nonimmigrant, during that period. What was crucial during those months was not the petitioner's exact status, but rather his availability to work for [redacted] prior to January 1, 2000. Given the petitioner's valid nonimmigrant visa, the petitioner was available during that time, with or without the added benefit of a national interest waiver.

The documentation submitted with the petition consists of background information about the petitioner's education and employment history, [REDACTED] and its products, and the now-moot Y2K computer problem, as well as letters from two of the petitioner's college professors and the chairman and CEO of [REDACTED]. The petitioner's professors state in general terms that the petitioner is skilled with computers, and [REDACTED] chairman/CEO states that the company has generated enormous profits by marketing Y2K-related products designed by the petitioner and his co-workers.

The director denied the petition, stating that the petitioner has not shown that his work is of greater significance than that of the countless others who also worked to resolve the Y2K crisis. The general nature of the Y2K problem did not mandate national interest waivers for every alien computer expert, as qualified U.S. experts were also hard at work on the problem.

On appeal, counsel repeats the assertion that the "Year 2000 (Y2K) problem is a very urgent issue that needs to be solved immediately." Counsel also repeats that the petitioner is authorized to work for [REDACTED] until December 1, 2000 as a nonimmigrant, but fails to draw the obvious conclusion that neither a national interest waiver, nor any further immigration action of any kind, would be necessary for [REDACTED] to retain the petitioner's services during the months then leading up to January 1, 2000.

Counsel asserts that [REDACTED] creates other software products, beyond Y2K-related software. For example, [REDACTED] is developing currency-conversion software in anticipation of the European Union's adoption of the Euro as the new currency in member nations. While the petitioner is the chief architect of this software as well as the aforementioned Y2K-related software, the petitioner has not demonstrated that this software is of substantially greater importance than comparable software from other manufacturers. Statements from officials of [REDACTED] or from the petitioner's hired counsel, clearly cannot suffice to demonstrate empirically that [REDACTED] currency-conversion software has had, and will likely continue to have, a more significant impact than software from rival firms. Indeed, statements on appeal indicate that the currency-conversion software was still in development as of April 1999, when the petitioner submitted the appellate brief. Therefore, any assertion about benefits arising from this software is necessarily speculative.

An individual can play a key role for a private corporation without serving the national interest; for instance, the individual's chief significance may lie in allowing the corporation to outperform its U.S. rivals. There is no inherent national interest in ensuring the success of one U.S. corporation at the expense of competing U.S. corporations. The petitioner must show that he, in particular, is important not only to his employer, but to the United States as a whole.

Counsel then argues that, if [REDACTED] were to seek a labor certification on the petitioner's behalf, the entire process would take so long that the petitioner's nonimmigrant visa would likely expire, even if it were to be extended until December 2004. Service records show that [REDACTED] has since filed another immigrant visa petition, in the same classification, on the petitioner's behalf. This later petition, receipt number WAC 00 152 55885, was approved on July 24, 2000, allowing the petitioner over four years to adjust status, using counsel's assumption of a three-year extension on the petitioner's nonimmigrant visa. Thus, the approval of another petition appears to have neutralized this issue, and arguably makes this present appeal moot.

The appeal contains further background information and witness letters, which primarily touch on issues which counsel addressed in the brief discussed above. The bulk of the record discusses the now largely resolved Y2K problem, with some discussion of other as-yet-unfinished products which the petitioner is developing for [REDACTED]. The mostly uneventful passage of January 1, 2000, together with contributing factors such as the petitioner's valid nonimmigrant visa and the recent approval of another immigrant visa petition in the same classification, effectively refute counsel's most emphatic arguments in favor of granting the national interest waiver in this matter.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.